

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

RICHARD BANDA,

Petitioner,

v.

HIGH DESERT STATE PRISON, et al.,

Respondent.

Case No. 2:19-cv-00989-KJD-VCF

**ORDER**

**I. Introduction**

This is a habeas corpus action under 28 U.S.C. § 2254. Currently before the court is the motion for equitable tolling due to COVID-19 of petitioner, Richard Banda. ECF No. 15. Respondents have filed an opposition. ECF No. 18. Banda has filed a reply. ECF No. 19. The court denies the motion because under the court's calculations, explained below, the one-year limit under 28 U.S.C. § 2244(d)(1) already expires after the equitably tolled deadline that Banda proposes.

Banda also has filed a motion for leave to file second amended petition. ECF No. 20. Respondents have filed an opposition. ECF No. 21. Banda has filed a reply. ECF No. 22. The court grants the motion for the reasons stated later in this order.

Finally, Banda has filed a motion for leave to file notice of supplemental authority. ECF No. 23. This motion is in support of his motion for equitable tolling. Respondents have filed a

1 motion for enlargement of time to respond to Banda's motion. ECF No. 25. Both motions are  
2 moot because the court is denying the motion for equitable tolling.

## 3 **II. Background**

4 After a jury trial in the Eighth Judicial District Court, Banda was convicted of one count  
5 each of burglary, assault with a deadly weapon, and possession of a controlled substance. Ex. 16  
6 (ECF No. 17-16). Banda appealed. The Nevada Supreme Court affirmed on July 31, 2018. Ex.  
7 21 (ECF No. 17-21).

8 Banda then filed a post-conviction habeas corpus petition in the state district court, on  
9 September 21, 2018. Ex. 24 (ECF No. 17-24). The state district court denied the petition on  
10 April 22, 2019. Ex. 26 (ECF No. 17-26). Banda filed a notice of appeal on May 6, 2019. Ex. 27  
11 (ECF No. 17-27). The Nevada Supreme Court dismissed the appeal on July 12, 2019. Ex. 28  
12 (ECF No. 17-28). Remittitur issued on August 6, 2019. Ex. 29 (ECF No. 17-29).

13 The court takes judicial notice of the on-line dockets of the Eighth Judicial District Court,  
14 Case No. A-18-781327-W<sup>1</sup> and C-17-322402-1,<sup>2</sup> and the Nevada Supreme Court and Nevada  
15 Court of Appeals, Case No. 78752<sup>3</sup> and 80329 & 80329-COA.<sup>4</sup> Banda filed a second state post-  
16 conviction habeas corpus petition on August 8, 2019. The state district court denied the petition  
17 on December 23, 2019. Banda appealed. The Nevada Supreme Court transferred the case to the  
18 Nevada Court of Appeals, where it is pending at the time of this order.

19 Banda mailed his initial federal habeas corpus petition under 28 U.S.C. § 2254 to this  
20 court on June 7, 2019. ECF No. 5. The court appointed the Federal Public Defender to represent  
21 Banda, and gave Banda leave to file an amended petition. ECF No. 8. The court set May 22,  
22 2020 as the deadline to file an amended petition. ECF No. 14. Banda filed a first amended  
23 petition on April 22, 2020. ECF No. 16.

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25  
26 <sup>1</sup> <https://www.clarkcountycourts.us/Anonymous/CaseDetail.aspx?CaseID=11898942>. All docket reports were  
27 generated on May 20, 2020).

<sup>2</sup> <https://www.clarkcountycourts.us/Anonymous/CaseDetail.aspx?CaseID=11764445>

<sup>3</sup> <http://caseinfo.nvsupremecourt.us/public/caseView.do?csIID=55404>

<sup>4</sup> <http://caseinfo.nvsupremecourt.us/public/caseView.do?csIID=57658&combined=true>

### 1      **III.      Legal Standard**

2            A person has one year from the date the state-court judgment of conviction became final  
3 to file a federal habeas corpus petition under 28 U.S.C. § 2254. 28 U.S.C. § 2244(d)(1)(A).  
4 Section 2244(d)(1) has other possible dates of accrual, but none of them are applicable to this  
5 action. If the judgment is appealed, then it becomes final when the Supreme Court of the United  
6 States denies a petition for a writ of certiorari or when the time to petition for a writ of certiorari  
7 expires. Jimenez v. Quarterman, 555 U.S. 113, 119-20 (2009). See also Sup. Ct. R. 13(1).

8            Any time spent pursuing a properly filed application for state post-conviction review or  
9 other collateral review does not count toward this one-year limitation period. 28 U.S.C.  
10 § 2244(d)(2). The period of limitation resumes when the post-conviction judgment becomes final  
11 upon issuance of the remittitur. Jefferson v. Budge, 419 F.3d 1013, 1015 n.2 (9th Cir. 2005). A  
12 prior federal habeas corpus petition does not toll the period of limitation. Duncan v. Walker, 533  
13 U.S. 167, 181-82 (2001).

14            Section 2244(d) is subject to equitable tolling. Holland v. Florida, 560 U.S. 631, 645  
15 (2010). "[A] 'petitioner' is 'entitled to equitable tolling' only if he shows '(1) that he has been  
16 pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and  
17 prevented timely filing." Id. at 649 (quoting Pace, 544 U.S. at 418).

18            The petitioner effectively files a federal petition when he delivers it to prison officials to  
19 be forwarded to the clerk of the court. Rule 3(d), Rules Governing Section 2254 Cases in the  
20 United States District Courts.

### 21      **IV.      Discussion**

#### 22            **A.      The one-year limit does not appear to expire until August 6, 2020**

23            Banda's judgment of conviction became final on October 29, 2018, when the time to  
24 petition the Supreme Court of the United States for a writ of certiorari expired. Banda already  
25 had filed his first state post-conviction on September 18, 2018. Ex. 24 (ECF No. 17-24).  
26 Consequently, the one-year limit was tolled immediately upon its start, with no time having run.  
27 The tolling would appear to end, and the one-year limit would appear to resume, after the Nevada  
28

1 Supreme Court issued its remittitur on August 6, 2019. Ex 29 (ECF No. 17-29). The one-year  
2 limit thus appears to expire at the end of August 6, 2020.

3 **B. Petitioner states that the one-year limit expires on May 22, 2020**

4 However, Banda states that the one-year limit expires on May 22, 2020, the same as the  
5 court-set deadline for filing an amended petition. ECF No. 15 at 2 & n.3. Banda does not explain  
6 how he calculated that deadline. To attempt to discern Banda's reasoning, the court has examined  
7 the exhibits filed in this action and the judicially noticed state-court dockets.

8 **1. The Nevada Supreme Court did not affirm, but dismissed the appeal**

9 The first thing that the court noticed was that the Nevada Supreme Court did not affirm  
10 the denial of the first state post-conviction habeas corpus petition. Instead, it dismissed the  
11 appeal. Ex. 28 (ECF No. 17-28). The Nevada Supreme Court stated:

12 Appellant filed a notice of appeal on May 6, 2019. The notice of appeal fails to  
13 identify any decisions of the district court. . . . To the extent that appellant appeals  
14 from the order denying a "motion for an order to grant evidentiary hearing," no  
15 statute or court rule provides for an appeal from such an order. . . . To the extent  
that appellant appeals from the order denying a motion to modify sentence entered  
on January 14, 2019, the notice of appeal was untimely filed.

16 Ex. 28 at 1 (ECF No. 17-28 at 2) (citations omitted). It appears that the appeal was dismissed for  
17 procedural reasons. If the appeal was not properly filed, then time spent on the appeal was not  
18 tolled under 28 U.S.C. § 2244(d)(2), and tolling would have ended when the time to file an appeal  
19 expired on May 22, 2019, thirty days after the state district court issued its notice of entry of order  
20 on April 22, 2019. See Nev. Rev. Stat. § 34.575 (thirty days to file notice of appeal after issuance  
21 of notice of entry of order). The federal one-year limit then would expire on May 22, 2020.

22 **2. The peculiarities of the Nevada Supreme Court's decision**

23 The Nevada Supreme Court's order is peculiar based upon Banda's exhibits. The Nevada  
24 Supreme Court first criticizes Banda for not designating the district court order that he was  
25 appealing. Ex. 28 at 1 (ECF No. 17-28 at 2). Then the Nevada Supreme Court appears to  
26 examine the district court's docket for any appealable orders. Id. An order denying Banda's  
27 request for an evidentiary hearing was not appealable. Id. The time to appeal the order denying  
28 the motion to modify sentence had expired before Banda filed his notice of appeal. Id. However,

1 the Nevada Supreme Court did not mention the order denying the first state post-conviction  
2 habeas corpus petition. That state district court issued its notice of entry of order on April 22,  
3 2019. Ex. 26 (ECF No. 17-26). That decision is appealable, and Banda needed to file a notice of  
4 appeal within 30 days of the issuance of the notice of entry of the order. Nev. Rev. Stat.  
5 § 34.575. Banda did file a timely notice of appeal on May 6, 2019. Ex. 27 (ECF No. 17-27).  
6 The Nevada Supreme Court appeared to overlook the order denying the petition.

### 7 **3. Procedures for filing state post-conviction habeas corpus petitions**

#### 8 **a. What the law states**

9 In Nevada, a petitioner who is challenging the validity of a conviction or a sentence must  
10 file a post-conviction habeas corpus petition with the clerk of the district court for the county  
11 where the conviction occurred. Nev. Rev. Stat. § 34.738(1). The clerk of the court must open a  
12 new action that is separate and distinct from the underlying criminal action, file the criminal  
13 action's record with the petition, and, if possible, assign the petition to the original judge or court.  
14 Nev. Rev. Stat. § 34.730(3). The new-action rule has been the law since 1991.

#### 15 **b. The Eighth Judicial District Court has changed its practices**

16 In this court's experience, until a few years ago the Eighth Judicial District Court had a  
17 practice different from what the statute says. If a person sent a post-conviction habeas corpus  
18 petition that challenged the validity of a judgment of conviction to the Eighth Judicial District  
19 Court, then the clerk of that court, instead of opening new actions, would file the petition in the  
20 underlying criminal action. For example, the case numbers on the title page of a state-court  
21 appellate brief attached to the petition in Perez v. Attorney General, Case No. 2:18-cv-02077-  
22 KJD-VCF, ECF No. 1 at 10, indicate that the state post-conviction habeas corpus petition was  
23 filed in the underlying criminal action. Later in the brief, counsel for Perez states that the post-  
24 conviction petition was filed on January 5, 2016. Id. at 18.

25 That practice changed recently, and, for the purpose of this case, on or before September  
26 21, 2018. The clerk of the Eighth Judicial District Court now follows the statutory guidelines,  
27 opening a new civil action for a post-conviction habeas corpus petition. If notice of this change  
28 in practice has been released to the public, then this court has been unable to find it. Likewise, if

specific notice of the new case number was sent to Banda, then this court has been unable to find it in the state-court dockets of Banda's cases. It appears likely that Banda and any other inmates who were helping him were unaware of the change.

#### **4. Banda's first state petition fell into a crack with the new practice**

When Banda completed the state post-conviction petition form, he wrote his criminal case number, C-17-322402-1, on the upper left of the first page. Ex. 24 (ECF No. 17-24 at 2). Somebody, probably the state district court clerk, crossed out that number and wrote a civil case number, A-18-781327-W, in the upper right of the first page. *Id.* The order denying the petition and the notice of entry of the order used the civil case number. Ex. 26 (ECF No. 17-26 at 2, 3). When Banda filed his notice of appeal, he wrote the criminal case number on the form. This time, the state district court clerk did not correct the error.

The court has examined the docket of the Nevada Supreme Court, Case No. 78752. Document number 19-20512,<sup>5</sup> filed on May 10, 2019, contains the notice of appeal, the case appeal statement, the docket sheet, and the court minutes for the criminal action, Case No. C-17-322402-1. The only mention of a related case is a small note on the first page of the docket sheet, stating that Case No. A-18-781327-W is a writ related case. Nothing in the body of the docket sheet of Case No. C-17-322402-1 states either that a post-conviction habeas corpus petition was filed in another case or that the petition was denied. Looking at this docket sheet, it would be easy to conclude, as the Nevada Supreme Court did, that Banda either was trying to appeal either a non-appealable order or an appealable order too late.

#### **5. If the appeal was not properly filed, then equitable tolling is warranted**

If the appeal was not properly filed within the meaning of 28 U.S.C. § 2244(d)(2), then the court finds that equitable tolling is warranted. This is not simply a matter of Banda writing the wrong case number on a document. The state district court changed its long-standing practice of conducting post-conviction proceedings in the underlying criminal case. Counsel for Banda does not seem to have noticed this change, because in the index of exhibits counsel used the

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<sup>5</sup>

<http://caseinfo.nvsupremecourt.us/document/view.do?csNameID=55404&csIID=55404&deLinkID=717147&onBaseDocumentNumber=19-20512>

1 criminal case number, not the post-conviction habeas corpus case number, for the state post-  
2 conviction documents filed in the state district court. ECF No. 17 at 3. This court noticed the  
3 change in practice when it saw that the case number on the order denying the state petition was  
4 different from the case number in the index of exhibits. Indeed, soon after Banda commenced  
5 this action, the court preliminarily reviewed the state-court dockets for timeliness issues and did  
6 not notice the change in practice then. The state district court clerk might not have noticed that  
7 Banda was trying to appeal the denial of the post-conviction habeas corpus petition, because  
8 Banda was litigating other post-conviction motions simultaneously, and those were filed in the  
9 criminal action.

10 This appears to be an unintentional, extraordinary circumstance that prevented Banda  
11 from knowing that he had a procedural problem with his appeal until after the post-conviction  
12 proceedings had concluded. Under the circumstances, equitable tolling would be warranted at  
13 least until the Nevada Supreme Court issued its remittitur on August 6, 2019, making the federal  
14 one-year limit expire at the end of August 6, 2020.

15 The problem seems to have been corrected. Banda's current appeal before the Nevada  
16 Appellate Courts, Case No. 80329 & 80329-COA, refers to both the criminal action and the post-  
17 conviction habeas corpus action. The records of both actions are in the appellate courts' docket.  
18 If a person files a notice of appeal of an appealable order, it appears that the new practice has  
19 solidified enough that the appellate courts will not think that a person is appealing nothing.

20 **C. The court will deny the motion for equitable tolling**

21 Whether by giving Banda the full benefit of statutory tolling or by giving him equitable  
22 tolling due to the confusion in filing his appeal from the denial of the first state petition, the  
23 federal one-year limit expires at the end of August 6, 2020. In his current motion, Banda asks for  
24 equitable tolling due to the COVID-19 pandemic up to and including August 3, 2020. Granting  
25 the motion is unnecessary, because the one-year limit already expires after the date that Banda  
26 requests.

**D. Banda's motion for leave to file a notice of supplemental authorities is moot**

Banda asks for leave to file a notice of supplemental authorities in support of his motion for equitable tolling. ECF No. 23. This motion is moot because his request for equitable tolling is unnecessary.

**E. Respondents' motion for enlargement of time is moot**

Respondents have filed a motion for enlargement of time to respond to Banda's motion for leave to file a notice of supplemental authorities. ECF No. 25. Respondents' motion is moot because Banda's motion is moot.

**F. The court will grant Banda's motion for leave to file a second amended petition**

Finally, before the court is Banda's motion for leave to file a second amended petition for a writ of habeas corpus. ECF No. 20. Respondents oppose the motion, but they do not persuade the court. It is common practice for the Federal Public Defender, when faced with an imminent expiration of the one-year limit, to file an amended petition and then ask for leave to file a second amended petition. That way, claims in the otherwise untimely second amended petition might relate back to the claims in the first amended petition. The court often grants such requests, as Banda notes in his reply. See ECF No. 22 at 2. In so doing, the court necessarily dispenses with the requirement in Local Rule 15-1(a) that a petitioner attach a copy of the proposed amended petition to the motion for leave to amend, because the point of the procedure is to give a petitioner additional time to develop his claims for relief. As it happens, this procedure is unnecessary in this case, because the court has concluded that the one-year limit will not expire until August 6, 2020. Nevertheless, the court should freely grant leave to amend in the interests of justice. Fed. R. Civ. P. 15(a)(2). The court already gave Banda leave to file an amended petition. Were it not for the confusion over Banda's state post-conviction appeal, he probably would not have filed his first amended petition (ECF No. 16) when he did. Due to the COVID-19 pandemic, he probably would be asking for as much time as possible to file the amended petition, and the court would be granting those requests. For those reasons, the court grants his motion for leave to file a second amended petition.



Part of respondents' argument concerns the availability of state-court on-line dockets. ECF No. 21 at 3. Respondents note that the dockets of the criminal case, C-17-322402-1, and the post-conviction habeas corpus case, A-18-781327-W, are on-line. That is true, but the documents themselves are not available, at least on the Clark County Courts' publicly available web site. Respondents also note that dockets of Banda's direct appeal and post-conviction appeals, Case No. 73946, 78752, and 80329 & 80329-COA, are available on-line. That is true, and some documents are available, but not all. Appellate appendices now are available on-line, except for sealed documents.<sup>6</sup> For example, in Case No. 80329 & 80329-COA, portions of the district court's record are filed under seal and unavailable. Counsel for Banda actually can do more investigation on-line now than before the COVID-19 pandemic, but counsel still would retrieve only an incomplete state-court record. The availability of dockets on-line thus does not change the court's decision to grant Banda leave to file a second amended petition.

#### V. Conclusion

IT THEREFORE IS ORDERED that petitioner's motion for equitable tolling due to COVID-19 (ECF No. 15) is **DENIED**.

IT FURTHER IS ORDERED that petitioner's motion for leave to file notice of supplemental authority (ECF No. 23) is **DENIED** as moot.

IT FURTHER IS ORDERED that respondents need not respond to the first amended petition (ECF No. 16).

IT FURTHER IS ORDERED that petitioner's motion for leave to file second amended petition (ECF No. 20) is **GRANTED**. Petitioner will have up to and including August 6, 2020, to file a second amended petition. The court's scheduling order of August 2, 2019 (ECF No. 8) otherwise remains in effect.

DATED: June 3, 2020



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KENT J. DAWSON  
United States District Judge

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<sup>6</sup> [https://nvcourts.gov/Supreme/News/Appendices\\_Are\\_Now\\_Electronically\\_Available/](https://nvcourts.gov/Supreme/News/Appendices_Are_Now_Electronically_Available/)